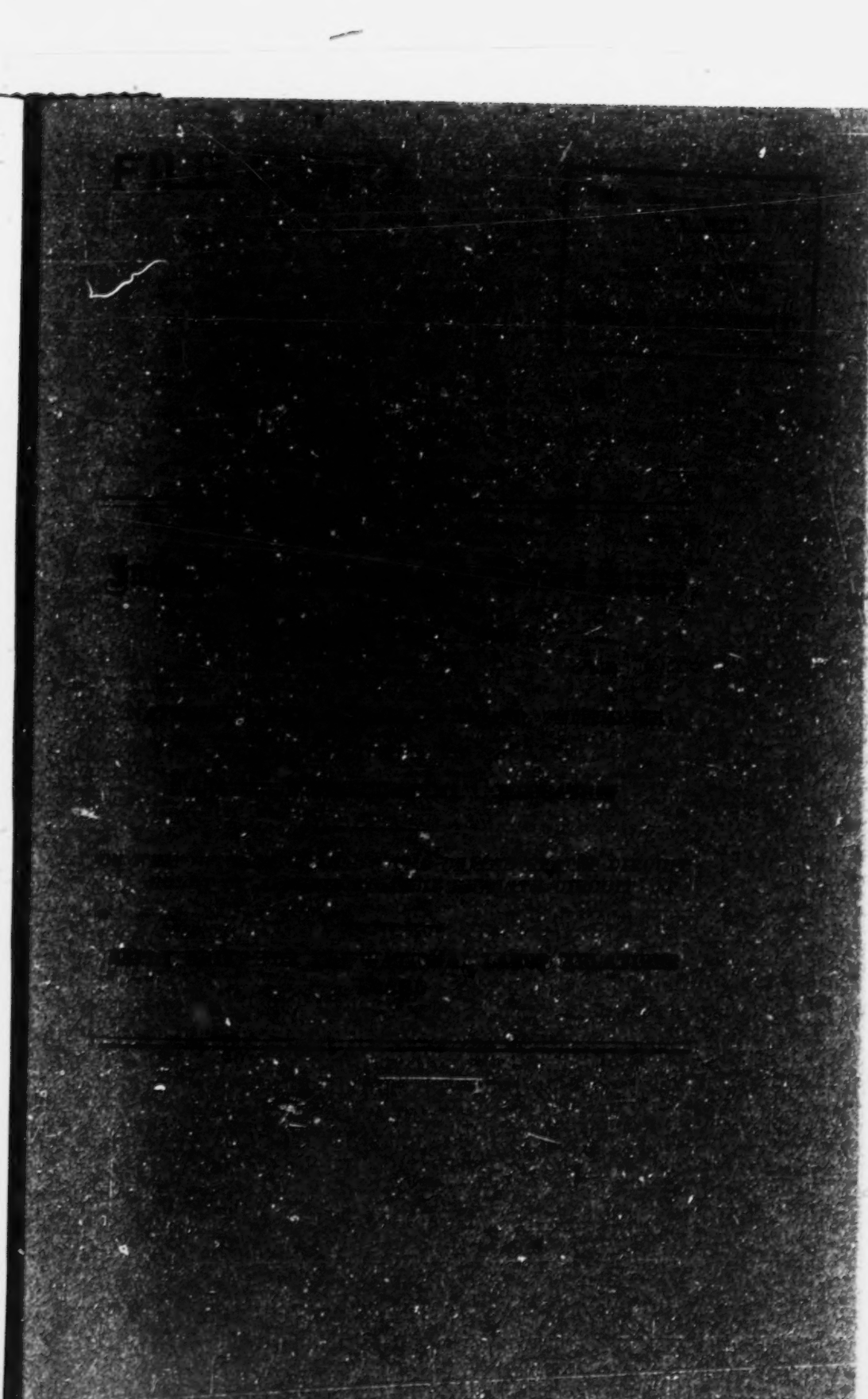

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120021—39——1

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 436

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANSTEEL METALLURGICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

FURTHER STATEMENT OF THE FACTS MADE IN THE LIGHT OF RESPONDENT'S BRIEF

1. Respondent asserts (brief, p. 2) that "The proceedings * * * grew out of the forcible seizure of respondent's plant in a so-called 'sit-down' strike." The source of the proceeding is, as the statute requires, the unfair labor practices committed by respondent during the six months preceding the strike. The strike succeeded these

violations of the law and is relevant only to the appropriateness of the affirmative relief required by the Board. Respondent cavalierly ignores its open defiance of the law in maintaining that the order should be set aside. Thus, it dismisses the hiring of Alfred Johnstone on August 17, 1936, and the labor espionage carried on through him during the succeeding four months (petitioner's main brief, pp. 23–27) with the statement that "the man in question * * * in no way participated in any of the matters in controversy before the Board" (brief, p. 3). But this unfair labor practice was set forth in the charge filed by the Union (R. 33), was alleged in the complaint issued by the Board (R. 27), and was found by the Board to have been committed (R. 1952–1955).[1] Entirely ignored

[1] Respondent's characterization of Johnstone's reports as "general plant recommendations" (brief, p. 3) cannot avoid the fact that they were instruments of industrial espionage. Not only did some of them contain information concerning the Union, but even the improvements recommended were those which the Union had discussed requesting of respondent. By receiving these secret reports, respondent was able to appear to its employees as having itself decided to improve conditions without Union prompting. This is, of course, a familiar tactic used by employers to thwart unionization by convincing the employees that it is unnecessary. Each of the following suggestions for plant improvements which Aitchison attributed to Johnstone's reports was a demand which had been formulated or discussed by the Union: installation of hot water in washrooms, better ventilation, cool water in drinking fountains, improved dust extraction, isolation of carbon jobs, isolation and screening of torch welding jobs (R. 364–365, 1634, 1655).

in respondent's brief is the Board's finding, supported by uncontradicted evidence, that from early November until a short time before the strike respondent isolated the Union president from the other employees (R. 438–443, 274). The injection of a provocateur and spy into the ranks of the employees and the maneuver whereby respondent deprived the Union members of contact with their leader are among the unfair labor practices which the Board's order was designed to remedy. It was only after months of provocation by these flagrant violations of the law, among others, that the employees engaged in the conduct which respondent presents as the whole of the case.

2. In similar fashion respondent treats as insignificant its campaign to obtain acceptance by its employees of an employee representation plan, characterizing the incident as a suggestion not authorized by the respondent's officers and hinting that the men were never led to believe that the company favored the plan (brief, pp. 2–3). But the undisputed evidence shows, as the Board found (R. 1948–1951, 1964), a vigorous campaign conducted by the superintendent and foremen to coerce the employees into abandoning the Union and adopting in its stead an inside union. The plant superintendent admitted his responsibility for the campaign and testified that he caused copies of the proposed representation plan to be mimeographed and distributed to each employee in interoffice com-

munication envelopes (R. 1350–1352, 1358, 1635–1643, 1646–1655, 259–260, 284, 316–317, 326, 430–435, 889, 896–897). Company union literature was posted on bulletin boards throughout the plant. The superintendent himself, with the assistance of foremen, during working hours, circulated the petitions for adherence to the employee representation plan among the employees, and obtained their signatures by threats that the employee "had better sign this if he thought anything of his job" (R. 867, 869, 871, 880, 884, 886–889, 911–913). Some of the strong Union men refused to sign (R. 413, 423, 430, 433, 436, 891–893, 896–897); some signed because they "were scared" (R. 888). Such abuse of economic power carried on throughout a plant by an entire supervisory force cannot be waved aside with unsupported statements that the employees "were given no assurance the plan would be acceptable to the company" or that the "suggestion" was made "without authority from the respondent's officers" (respondent's brief, pp. 2–3). A private conversation between respondent's president and superintendent in which the former told the latter to drop the campaign can hardly be said to have dissipated the campaign's coercive effects. The employees had been impressed with respondent's desire to have an inside union, and this desire bore fruit after the strength of the Union had been broken. Respondent has never seriously argued that this conduct was not an unfair labor practice nor that respondent was not responsible therefor.

3. Respondent's brief likewise fails to mention the unfair labor practices consisting of respondent's usurpation of authority to dictate who might serve on its employees' representation committees and of respondent's outright refusal to recognize an "outside" union (petitioner's main brief, pp. 27–34). Respondent confuses the issue by suggesting that the men were trying to obtain a closed shop and check-off (brief, pp. 2, 38) and that the Union membership had been obtained by coercion and intimidation (brief, pp. 4, 49). The record establishes beyond dispute that respondent's refusal to recognize or deal with the Union was not based upon any objection to the demands advanced by the Union nor upon any question as to whether the Union was the freely chosen representative of the employees; the sole and freely expressed basis for such refusal was respondent's determination not to recognize any labor organization with national affiliations (petitioner's main brief, pp. 27–34). In any event, the closed shop provisions contained in the tentative draft of an agreement presented on September 10 were at once abandoned when respondent objected to them; a new contract without these terms was drawn, and at no time subsequent to September 10 did the Union renew its demand for a closed shop (R. 211, 213, 261–262, 264–265, 286–287, 1654–1655). Nor is there any evidence in the record to the effect that any Union members were caused to join by coercion or intimidation; in fact, there is no evidence that any

person was in any way solicited to become a member by threats or other improper means.[2] Respondent did not elicit from a single one of the approximately 90 Union members who testified at the hearing any questionable circumstance in connection with his joining. Not a single other witness was called whose testimony supports the allegations now made concerning the Union's coercive organizing methods. The record is not only devoid of any evidence to support respondent's charge, but presents as a whole a picture of self-organization among employees, many of whom had worked side by side at respondent's plant for about a quarter of a century, of such a nature as to negative any impropriety in the solicitation of memberships.[3]

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[2] Respondent's brief (pp. 4, 49) cites for its assertions in this regard the decree of the state court in the contempt proceeding (R. 1765). This decree makes no findings that any specific person or persons were so coerced or intimidated but contains mere general findings. The Board was not a party to the contempt suit and the findings there made in no way bind the Board.

[3] The unionization at respondent's plant began among employees who had worked at the plant for 15 to 25 years who were dissatisfied over the way respondent ignored their length of service in its change of methods and pay resulting from the introduction of efficiency experts (R. 171–181, 313–320, 323, 412, 651). After determining to form a union and deciding upon the national organization with which they desired to affiliate, the men sought out an organizer of that national organization (R. 220–221). While this organizer gave the men some assistance by furnishing them membership cards, explaining how to conduct meetings, etc., the organizing and conduct of the Union were essentially carried on by these employees of long service without the assistance of "outsiders" (R. 171–181, 184–185, 220–225, 236, 312–323, 1361–1367, 1383–1386).

4. Neither does the record sustain respondent's assertion (brief, p. 4) that "deliberate, provocative slowdowns were organized." The only record reference cited by respondent fails to support the statement. The witness, a foreman hired about the middle of November and entirely inexperienced in the type of work he was supervising (R. 1304–1311), testified that he was trying to introduce the "speed up" (R. 1311) and while his testimony at most indicates opposition to the speed up, a fairer interpretation would be that his methods were different from those the men were accustomed to and occasioned some friction (R. 1302–1303, 1308–1311, 400–403). Responsible Union leaders testified that no slowdown was organized (R. 321–323, 400–403). If there had been a deliberate slowdown, it cannot excuse respondent's defiance of the Act.

5. The evidence concerning the crucial meetings of February 17 is misstated by respondent. The testimony shows that no outside organizer was in any way involved in these meetings, contrary to respondent's assertion that at these meetings "the Plant Superintendent denied a request that he confer with their outside organizer" (brief, p. 4). What occurred is that a committee of the Union composed solely of respondent's own employees endeavored to obtain a meeting with respondent's president, who refused to confer with them (R. 257, 270, 271, 288–289). Anselm, the plant superintendent, who acted as respondent's representative at these meetings, placed the refusal to confer

squarely upon the ground that respondent would not recognize an "outside" union (R. 257–258, 288–289), the same position which respondent had so often frankly and unqualifiedly reiterated to its employees.

6. It was only as a direct result of these unfair labor practices that the employees went on strike. Without seeking in any way to justify the conduct of the employees which occurred during the strike, it should be pointed out that respondent has, throughout its brief, greatly exaggerated the events. When the strike began the Union members suggested that the foremen, women, and other employees who did not want to participate in the sit-down leave the buildings (R. 732, 737, 748, 762, 772, 779–783, 786, 794–796, 802–803, 806–807, 824, 953, 1047, 1130). The strike began in an orderly fashion without violence of any sort. Laboratory employees were permitted to return to the laboratory for the purpose of continuing their work (R. 275). During the entire strike the strikers inflicted no damage upon the machinery. The Board's finding that there was no sabotage (R. 1967) is sustained by the testimony of respondent's president that there was no injury to the machinery except some external rust and neglect (R. 1195–1196, 1336–1337). When questioned as to whether respondent discovered any deliberate destruction or vandalism he replied "We found very little serious trouble with the machinery" (R. 1196). There is no other testimony in the record of any injury to the machinery

except by rust. The only injuries to the buildings occurred during the two encounters with the deputies. The only extensive damage shown by the evidence was the breaking of windows when the deputies shot bombs and projectiles of tear and emetic gas into the plant and the strikers broke additional window panes (R. 584, 1105, 1115–1116, 1128, 1133, 1137, 1144, 1151, 1174). The strikers did throw tools and supplies and directed water and fire extinguisher streams at the deputies (as testified to by four of these same strikers who did these things and who were reinstated by the company on its terms). The figure of $62,000 damages given by respondent (brief, pp. 10, 46) represents, according to the testimony of respondent's president, a cost of $10,000 to $12,000 to repair the buildings and machinery and restore the inventory (R. 1180–1181), a loss of $20,000 in fixed charges and overhead expenses during the period the plant was not in full operation (1181–1182) and a loss of $30,000 of prospective profits from business which respondent had hoped to receive but did not (R. 1181–1182). The items of $20,000 and $30,000 were not attributable to the sit-down character of the strike. There was no evidence in the record to sustain these estimates of the amount of damages aside from Aitchison's assertion.[4]

[4] The strikers showed numerous instances of care for the property. A striker finished certain chemical processes requiring 4 hours' work after the strike began so that no loss

Although some of the strikers suffered severe injuries from being struck by gas bombs and from the effects of the gas (R. 751, 948–949) only three or four of the deputies received injuries and the record discloses that even these injuries were trivial (R. 1117, 1120–1121, 1336–1337). The sulphuric acid repeatedly referred to by respondent's brief was not in fact sulphuric acid, but rather a mixture composed of oil, ferrosulphate and some diluted sulphuric acid, and called "special electroloid" (R. 1107). Some of the pictures of the "missiles" referred to in respondent's brief (p. 6) give a misleading view because of enlargement or lack of indication of the relative size of the "missiles." The pictures in Respondent Exhibits Nos. 28–29 (R. 1837–1841) give an accurate view of their size.

7. Respondent states that upon reopening the plant "reemployment was affirmatively refused to certain of the men" and that "it accepted applications for reemployment only from those believed to have been coerced and intimidated into remaining within the buildings" (brief, pp. 10, 48). This is directly contrary to the testimony of respondent's president that respondent "took back as many

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would result (R. 733–734). Equipment was carefully placed away so that it would not be injured (R. 1419). In order to protect the machinery from the fog and mist after the windows were broken, the strikers patched the windows as best they could, wrapped machinery in water proof paper, and oiled the machinery to prevent rust (R. 1412–1414, 1419, 1425–1426). The strikers repaired pipes which broke from freezing when respondent turned off the heat (R. 1411–1415, 1419).

people as would come back" (R. 346). It is inconsistent with the testimony of respondent's superintendent that every man who applied for reinstatement during the period of restaffing was taken back without condition or limitation except two employees, aged 76 and 74 years, respectively, who were not reinstated solely because of their age (R. 1216) and that the only explanation he could give as to why some people who were in the sit-down were reinstated and others were not was that the latter would not have taken their jobs if offered (R. 1255). Finally, it conflicts with the position taken in respondent's exceptions to the intermediate report; there respondent stated that "such of the men who were discharged for the plant seizure on February 17, 1937 who filed application for reemployment were rehired by Respondent without condition or limitation" (R. 1910). Respondent's witnesses all emphasized that no distinctions were made in reinstating persons. Respondent made no effort to determine which of the strikers had been active in the resistance to the deputies and which had not: all who were willing to come back were reinstated. Respondent's assertion that "in no case did" reinstatement "extend to men who were thereafter sentenced for contempt by the Circuit Court of Lake County" (brief, p. 10) ignores the obvious fact that the reinstatements occurred in March, the sentencing for contempt in June, and that, while respondent had reinstated approximately half of those attached for contempt, only those who refused to re-

turn to work received sentences (petitioner's main brief, pp. 10, 51–54).

8. Respondent states that as to those who did not themselves engage in the sit-down but merely brought food and clothing, respondent "declined to recognize these men as employees and to reinstate them, upon the express ground that they had participated in that common criminal undertaking" (brief, p. 21). This entirely untrue. Respondent's president and superintendent testified at the hearing that all who applied were reinstated, that the only reason some did not return to work was their determination to remain on strike (*supra*). Moreover, respondent in its pleadings claimed that it individually solicited at least four of these persons to return to work but that they refused to do so (Otto Lantz, Mondro, Raynor, and Evelyn Graimer, R. 76, 81–82, 1074, 1923). The strikers who merely supplied the sit-down strikers with living necessities were not in the building at the time of the discharge, which in terms was limited to the occupants. No attempt was made to discharge anyone who did not take part in the sit-down but merely rendered assistance to the sit-down strikers.

9. Respondent asserts that the Board's brief supports its statement of respondent's active solicitation of sit-down strikers to return by references to mere talks between the strikers and their "brothers, apprentices, and other unauthorized persons" (brief, p. 51). In no instance was such solicitation cited except as to persons whom respondent alleged in its answer, amended answer, motion to dismiss,

and exceptions to the intermediate report that it had so solicited (R. 76, 81–82, 1074, 1923). In these pleadings respondent lists 22 of the 93 persons named in the complaint as persons whom it had solicited and who had refused to return to work, among them 15 or 16 sit-down strikers (petitioner's main brief, pp. 50–51). Respondent claimed to have taken back at least 37 sit-down strikers (R. 1216) and explained that the restaffing had been accomplished by foremen visiting such men as they needed for the operation of their department (R. 1213). The witnesses who had been rehired told of visits by foremen and others soliciting their return (R. 992, 1166, 922–923), as also did strikers who refused to return (R. 447, 449, 452–454, 661, 563, 572–574, 586, 731–735). Contrary to the position now taken in its brief, respondent attempted to prove at the hearing that certain of the employees knew they could return and would be reinstated but refused to abandon the strike (R. 734–735, 799, 809–820, 822, 910).

10. Respondent takes exception (brief, pp. 10–11, 15–16, 49, 51) to the Board's statements that only those who abandoned the Union and their efforts to secure collective bargaining through it, were reinstated (petitioner's main brief, pp. 17, 50, 51, 75). The charge (R. 33) and the complaint (R. 29–30) alleged that respondent refused to reinstate certain of the strikers because of their union activities. However, respondent took the position at the hearing, and its president and superintendent testified,

that all employees who were willing to return, with the exception of four whose exclusion was explained on peculiar personal reasons, were reinstated, that those not reinstated were still on strike and would not have returned if offered reinstatement, that many of the strikers had been asked to return and refused (R. 346, 1215–1216, 1255, 1910, 1923). A great many of the strikers testified they were still on strike at the time of the hearing and were at all times unwilling to return without Union recognition (R. 528, 562, 570–571, 594–595, 609, 613, 629–630, 650, 734–735, 757, 768, 775–777, 789, 798–799, 805, 816, 818–822, 902, 907, 910, 1038, 1040, 452–453, 460, 546, 554–555, 557–558, 560, 567, 572–575, 578, 581, 587, 590, 592, 597, 599, 602, 604, 611, 618, 622, 624, 625, 633, 642, 643, 661, 729, 740–741, 746, 750, 781–782, 910).

The Board, therefore, dismissed the charges and complaint insofar as they alleged that persons had been refused reinstatement on a discriminatory basis (R. 1961–1962, 1971). It did, however, find that by sending individual emissaries to the strikers to solicit their return to work, while it continued to refuse to recognize the Union, respondent engaged in unfair labor practices within the meaning of Section 8 (1).[5]

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[5] Due to the omission of a line of print between lines 23 and 24 on printed record page 1962 the sentence containing this finding is not completely set forth in the printed record. The sentence should read: "By the foregoing actions, as well as by going over the heads of the Union leaders and appealing to individual strikers to return to work, the respondent engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act." See 5 N. L. R. B. 930, 946.

It is obvious that all strikers who went back under such circumstances were in fact abandoning or suspending their effort to obtain recognition of the Union. Respondent's solicitation of their individual return under the circumstances was a solicitation of return without Union recognition and in abandonment of the Union. It is submitted that the Board's argument that in this manner a line has been drawn between those who were tenacious in their insistence that respondent obey the Act and those willing under the economic pressures of the situation to abandon these rights, which the Board order obliterates in the interests of effectuating the policies of the Act, is proper.

11. Respondent asserts that "neither in its decision nor the brief does the Board manifest an understanding of the nature of the reorganization. Here was no mere reduction in the number of employees doing the same work in the same department—three entire departments were eliminated" (brief, p. 53). Respondent claims that the jobs formerly occupied by 39 employees were "completely abolished" and that they had not been reinstated for that reason (petitioner's main brief, pp. 11, 52–56, 79–81). This is inaccurate. Respondent's president and superintendent each testified that seniority rules were observed in the plant so that when work was slack or jobs abolished old employees were transferred to other jobs before new persons were hired (R. 141, 1254). This system was applied to the reorganization in question inso-

far as the employees who abandoned the strike were concerned (R. 1185–1186, 1197–1198, 1208–1211, 1214–1215, 1254, 1829). No person who returned to work before the restaffing was completed, and only one who attempted to come back later, was refused a job because the department in which he had worked before the strike was abolished. A job in some other department was found for each of those who returned (R. 1185–1186, 1197–1198, 1214–1215, 1254). Many of the employees ordered reinstated had, during their long service at the plant, worked in various of the departments (R. 462, 900, 184, 593, 412). Of those whose jobs respondent claims to have abolished (brief, pp. 79–81) at least 9, according to respondent's pleadings and according to the proof in the case, were actively solicited to return (Clarence Dreyer, Lindberg, Luke, Moxey, Schuman, Wells, Raynor, Vivienne Johnson, Seifert, R. 76, 81–82, 831, 907–910, 1074, 1923). The jobs of Aigner and Hoff, the aged employees, were not in fact abolished but given to a new employee (R. 1215, 1297–1300). Many of the men to whom respondent would have this Court excuse it from offering reinstatement, on the basis of the supposed abolition of their jobs, have served respondent long years.[6] There is no way of knowing whether the jobs of these men would exist at the time of the

[6] Fulkerson, Sr., 22 years (R. 628); Moxey, 21 years (R. 906); Fagan, 20 years (R. 412); Anderson, off and on since 1921 (R. 648); Clarence Dreyer, 17 years (R. 540); Harold Dreyer, 10 years (R. 486); Phil Graimer, 18 years (R. 685); Oscar Johnson, 18 years (R. 642); Holm, Sr., 19 years (R.

reinstatement or whether there would be other jobs they could be given. The Union in its exceptions to the intermediate report alleged the reestablishment of part of the jobs (R. 1941–1943).

12. Numerous other misstatements, inaccuracies, and omissions occur throughout respondent's brief. Since they are apparent from an examination of the record references cited in support of the statements or from the facts found by the Board and supported by the evidence, no further enumeration will here be made.

II

RESPONDENT HAS NOT SHOWN THAT THE ALLEGED DISCHARGE BARS REINSTATEMENT

In answer to the Board's argument (petitioner's main brief, pp. 40–45) that a discharge after the occurrence of unfair labor practices does not terminate the employee status for purposes of Section 10 (c) of the Act, respondent states that the sole intent of Congress expressed in the statutory definition of "employee" is that workers should not, merely by going on strike, lose the rights guaranteed employees in the Act. Other portions of the committee report than that quoted by respondent (brief, p. 24) give further purposes of Section 2 (3) (petitioner's brief, note 16, pp. 41–42). The portion quoted does not purport to constitute an exhaustive description of the purposes of that section.

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467); Holm, Jr., 10 years (R. 544); Yaeger, 14 years (R. 611); Praski, 18 years (R. 636); Petraitis, 14 years (R. 753); Bunton, 11 years (R. 531); Brunke, 14 years (R. 527); Anderson, 17 years (R. 631); Aigner, 11 years (R. 614).

Respondent has not pointed out any right which the construction of the statute urged by the Board gives the employees here involved which is an addition to those possessed by employees at work (see *infra*, p. 26).

Respondent cites in support of its position *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61 (C. C. A. 4th). In that case the employer did not violate the statute prior to the strike which occurred. Nor did the case involve any question whether discharge for cause terminated the Board's power to require reinstatement. The court sustained the Board's findings that at the conclusion of the strike the employer refused to reinstate a number of the strikers by reason of their union activities and enforced the reinstatement order as to all but four persons. Those persons, the court thought on the evidence, had obtained regular and substantially equivalent employment before the Board's hearing, although the Board had made no finding on that whatever. Since Section 2 (3) expressly provides for termination of the prior employee status when such new employment is obtained, the court held that they were not employees of the company at the time of the Board's order. On rehearing, the case was remanded to the Board for the purpose of passing upon the equivalence of the employment obtained. 97 F. (2d) 959. The court's decision, therefore, relied on the very provision of Section 2 (3)—that the employee status ends when equivalent employment is obtained—which we have advanced (peti-

tioner's main brief, p. 41) as strong evidence that if Congress had intended the statutory employee status to be terminated in other ways it would have so stated.

Respondent also relies upon *Standard Lime & Stone Co.* v. *National Labor Relations Board,* 97 F. (2d) 531 (C. C. A. 4th). In that case the employees went on strike on April 24, 1935, prior to the effective date of the Act. On June 11 the company informed the strikers that any who did not report for work two days later would be discharged. Thereafter, but prior to the occurrence of any unfair labor practices, some of the employees engaged in various acts of violence. On July 15, after the effective date of the Act, the employer refused to bargain collectively with the union, upon the ground that the strikers who failed to return to work in accordance with the announcement of June 11 were no longer its employees. The court agreed with the Board's finding that the June 11 announcement did not sever the employment relation, but construed the refusal to bargain on July 15 as a discharge of those employees who were guilty of violence. Since the union did not represent a majority of the employees unless these men were counted in determining the representation, the court held that the employer had not violated the law and set aside the Board's order.

We think the decision unsound. The court erroneously construed the refusal to bargain as a "discharge," although the express basis of that

refusal was the June 11 announcement, which preceded the violence, applied to *all* those who thereafter remained on strike, and which the court held ineffective to terminate the employment relation. But even were the decision correct, it would not help respondent. There both the cause for the "discharge" and the "discharge" itself occurred prior to the commission of any unfair labor practices. In the present case, as we have pointed out *supra*, respondent violated the law before cause for discharge arose and before any discharge was attempted.

Both the *Mooresville* and *Standard Lime & Stone* cases, therefore, lacked all the elements we think significant in this case. It is apparent that the question to which respondent addresses its argument—whether strikers who are discharged for cause prior to the occurrence of unfair labor practices remain "employees" within the meaning of Section (10 (c)—is not pertinent here. The sole question at bar, in so far as the power of the Board to require the "reinstatement of employees" (Section 10 (c)) is concerned, is whether an employer may, after violating the Act, by discharge eliminate some of its employees from the class of persons whose reinstatement may be required by the Board to correct the violation, if such reinstatement will effectuate the policies of the Act. The Board's position on that question is set forth at pages 40–45 of petitioner's main brief. We

there argued that, once an unfair labor practice has occurred, the employer may not by discharge terminate the employee status for purposes of Section 10 (c) of the Act. Consequently, we contended, the employees retained that status at the time of the Board's order and were within the Board's power to require the reinstatement of employees.

But even if, as respondent urges, discharge terminates the employee status for purposes of Section 10 (c) at the time when it is effected, respondent is not aided thereby. In order to give effect to the purposes for which the power to require affirmative action was vested in the Board—to restore the situation to what it was before the law was violated—the term "employees," as used in Section 10 (c), if it be construed not to include employees so discharged, should be construed to refer to the status of the persons ordered reinstated at the time when the unfair labor practices occurred. At that time the Board's remedial powers, including reinstatement, attach subject to the condition that at the time of their exercise the action ordered must effectuate the policies of the Act. The violation of the law itself fixes the class of persons whose reinstatement may thereafter be ordered if such action will further the Act's policies. A discharge thereafter cannot retroactively remove individuals from this class. Clearly, it will not always effectuate the policies

of the Act to reinstate persons who were employees at the time of the unfair labor practices and were thereafter discharged for cause. But in so far as the question of power is concerned the situation which Congress intended to be re-created—that obtaining prior to the unfair labor practices—should control. It is not disputed that the persons ordered reinstated in this case were employees on and before February 17, 1937, when the unfair labor practices which are the grounds for their reinstatement were committed by respondent.

In our main brief we pointed out (note 18, p. 43) that it was not necessary, in passing upon the construction of the statute there advanced, to consider whether an employer's obligation to bargain with the representatives of his employees pursuant to Section 8 (5) of the Act continues after their discharge. That question is equally irrelevant under the present alternative argument. The standard of time determinative of employee status for purposes of Section 8 (5) may be the time of the request to bargain, a standard entirely irrelevant to employee status for purposes of Section 10 (c). The order of the Board in the present case, in so far as it requires respondent to cease violating Section 8 (5), is fully supported by respondent's refusal to bargain on February 17, 1937. Respondent does not question that at that time the persons employed by it were entitled to bargain collectively as employees.

III

REINSTATEMENT OF EMPLOYEES IN THE CIRCUMSTANCES HERE INVOLVED DOES NOT VIOLATE THE FIFTH AMENDMENT

Respondent's argument that, if construed to sustain the enforcement of that portion of the Board's order requiring reinstatement, the Act would violate the Fifth Amendment, ignores the nature of the construction of the Act which is involved. Respondent would have it appear (brief, pp. 32–34) that its right of discharge is placed under severe restrictions for purposes which do not further the policies of the Act. We think the contention to be entirely without basis.

Respondent proceeds upon the assumption that the Board in this case has construed the Act to find a "legislative prohibition" broader than the mere "legislative prohibition of the exercise by the employer of his right of discharge for the purpose of striking down the employees' right of organization," to quote respondent's brief, p. 33. But the Board did not find any discharge by respondent to have been an unfair labor practice. No question is therefore presented as to what discharges other than those whose prohibition has already been sustained in the *Jones & Laughlin* and companion cases, Congress could constitutionally prohibit. The o ıestion here is solely whether the Constitution bars Congress, as a remedy for violations of its valid prohibitions, from interfering with the nor-

mal rights of an employer to select its employees or to discharge them. This Court answered this question in the *Jones & Laughlin* case, 301 U. S. 1, at pp. 48–49, when it said:

> Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement.

The essence of respondent's argument is that reinstatement of an employee is only constitutional in cases where the violation of the statute for which it is imposed as a remedy is a discharge. However, reinstatement is just as appropriate to remedy other violations of the Act. See *Remington Rand, Inc.* v. *National Labor Relations Board,* 94 F. (2d) 862 (C. C. A. 2d) *certiorari denied,* 304 U. S. 576; *Black Diamond S. S. Corp.* v. *National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2d), *certiorari denied,* 304 U. S. 579; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), *certiorari denied,* 302 U. S. 731; *Carlisle Lumber Co.* v. *National Labor Relations Board,* 94 F. (2d) 138 (C. C. A. 9th), *certiorari denied,* 304 U. S. 575; *National Labor Relations Board* v. *Oregon Worsted Co.,* 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9th). Of course, wherever, after an unfair labor practice and as a remedy for it, an employer is required to reinstate employees, often necessitating the dismissal of other employees, the employer's

normal right to select and to discharge employees is interfered with. However, it is in the nature of remedies for wrongs that those required to right their violation of law are subjected to restrictions which would not be imposed upon them in the absence of their dereliction. In such instances the only constitutional question is whether the remedy is appropriate to the wrong, not whether it restricts rights which would have existed but for the wrong.

The Board's contention that employees who cease work as a result of a labor dispute or because of unfair labor practices, remain employees for the purposes of Section 10 (c) despite occurrences intervening between the cessation of work and the Board's order (petitioner's main brief, pp. 40–45), is sustained as constitutional in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, at p. 347, where this Court said:

> The plain meaning of the Act is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act. We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *National Labor Relations Board* v. *Jones & Laughlin Steel Corpora-*

> *tion,* 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of discharged employes. The requirement interfered with the freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employe in the case of a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision.

There is no infringement upon the employer's normal right of discharge by a construction of the Act that involves the continuance after an unfair labor practice of employees in a "statutory status" for the purposes of Section 10 (c). The employer's inability to decrease the group of persons eligible for reinstatement under the Act does not in itself deprive him of the right to exclude the employees from all the normal incidents of the employment relationship. Determination of the eligibility of persons for consideration as possible subjects for remedial action by a governmental agency vested with power to effectuate the purposes of a public statute is clearly not an incident of the employment relationship. Any limitation upon the employer's normal right to select or discharge his employees is first effected when the reinstatement power is exercised. It consists of a requirement that, despite the employer's exclusion of the employee from the normal incidents of the employ-

ment relationship, those incidents must be reestablished because of the previous unfair labor practices. The limitation is the same whether the source of the power is deemed to be that the discharged persons remain "employees" for purposes of Section 10 (c) or that the Act authorizes the Board to require the reinstatement of former employees.

Prerequisite to imposition of the limitation, however, is a finding by the Board, subject to the approval of the courts, that it will effectuate the policies of the Act--that is, protect interstate commerce from the injuries occasioned by industrial strife "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (Section 1). Limitation of the right of discharge may thus be effected only for the very purpose which, respondent concedes (brief, pp. 33–34), furnishes proper constitutional basis for the restriction.

In many cases facts occurring between the date of the unfair labor practice and the date of the Board's order may render reinstatement of given employees inappropriate to effectuate the policies of the Act. A discharge for cause where it evidences a genuine determination by an employer that the employee is unsuitable for continued employment, aside from his union activities, may

usually be such a fact. However, the facts of the instant case, including the disregard by the employer of any disqualification on account of the sit-down and resistance of the deputies, in connection with the reinstatement of all those who would abandon the strike at the time respondent reopened its plant, and the persistent and continued flagrant violation of the Act by respondent causing the strike, led the Board to determine that reinstatement in these circumstances would effectuate the policies of the Act.

Where, as we think is the case here, the Board in determining a remedy for prior unfair labor practices, properly finds that reinstatement of discharged persons is necessary to effectuate the policies of the Act, the constitutionality of the resulting limitation upon the right of discharge is controlled by the decisions of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases. In those cases this Court held that Congress may impose reasonable restriction upon the right of discharge so long as such restriction is conducive to the protection of commerce against industrial strife. That the Board's orders reinstating employees discharged for union membership or activity interfered with the right of discharge which the employer would have enjoyed apart from the statute did not preclude Congress from imposing this proper sanction "for the enforcement of its valid regulation" (301 U. S. at p. 48). The limitation placed upon respondent's right of discharge in the

instant case is for the same purpose as the restriction upheld in the *Jones & Laughlin* case, since it must effectuate the policies of the Act to be authorized by the statute. Both are equally necessary to protect the free flow of commerce by securing the rights of self-organization and collective bargaining guaranteed in the Act. There is no difference in kind between the two limitations; whatever difference there is in degree is of scant significance since under the statute a discharge for good cause will normally preclude any determination that reinstatement will effectuate the policies of the Act.

IV

ANSWER TO RESPONDENT'S ARGUMENT AS TO THE RARE METAL WORKERS OF AMERICA

Respondent argues that the R. M. W. A. was improperly found by the Board to have been dominated, interfered with, and supported in violation of Section 8 (2) because "employees who refused to join were not threatened, disciplined, discharged, or even approached by any member of the supervisory staff" (brief, p. 66), because the material support given the Union was not of great value, and because the difference in attitude evidenced by respondent towards the independent union was merely a result of its observance of the Act after its constitutionality was sustained (brief, pp. 64–72). But respondent fails to answer the most basic element upon which the Board made its findings as to the R. M. W. A. The Board's determination proceeded primarily on the fact that the 6 months of

overt hostility by respondent towards outside unions, always coupled with a suggestion that the employees set up an employee representation plan or shop union, left the employees with no alternative, if they desired any representation, but an independent inside union such as the R. M. W. A. (R. 1962–1965). The numerous acts of encouragement which respondent exhibited towards the R. M. W. A. when added to the fact that the outside union of the employees' own choice had been driven from the plant by respondent's unfair labor practices, present a complete picture of the new union as one of respondent's choice rather than one of the employees' free molding.

The employees had been desirous of securing the advantages of collective representation and organization. This is amply shown by the 6 months' struggle for the organization and recognition of the Union preceding the strike. These desires the respondent, by its whole course of conduct, fettered and circumscribed. It repeatedly told the employees and carried out its statements in terms the employees well understood, that it would not deal with an "outside" organization. It, at the same time, told the employees it would gladly deal with an "inside" organization. The superintendent and foremen even put on a vigorous and coercive campaign to establish an "inside" union.

The rapid, vigorous growth of the R. M. W. A., after the reopening of the plant in March, can only be attributed to the respondent's acts in diverting and confining the desires of its employees into and

within the channel of an "inside" union. Where an employer thus limits its employees to a particular form of labor organization and upon such limitation being imposed, a labor organization of the prescribed pattern springs into being, such an organization, in the absence of any showing to the contrary, must be presumed to reflect, in that respect, the will of the employer. Such an organization is not the result of a free choice, but one whose formation has been interfered with and dominated by the employer, within the meaning of the Act.

The continuance of recognition by an employer of such an organization can but serve to defeat self-organization and obstruct the exercise by the employees of a free choice of collective bargaining representative.

Respectfully submitted.

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